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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 116

NORMAN H. HELMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (Pet. 15-22) is reported at 340 F. 2d 15.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1964, and a petition for rehearing was denied on March 8, 1965 (Pet. 23-24; R. 591, 626). On March 26, 1965, Mr. Justice Black extended the time for filing a petition for certiorari to

May 7, 1965, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed plain error in instructing the jury that it might infer that petitioner intended the natural and probable consequences of his conscious acts.

2. Whether the district court erred in failing to instruct the jury that it must not consider evidence of items of unreported income not listed in the bill of particulars, where there was no such evidence.

3. Whether petitioner was deprived of a fair trial by the prosecutor's comments during summation to the jury.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7206. FRAUD AND FALSE STATEMENTS.
>
> Any person who—
>
> (1) *Declaration under penalties of perjury.*
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or

imprisoned not more than 3 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7206.)

STATEMENT

On February 27, 1963, petitioner was indicted in the United States District Court for the Eastern District of Texas, Beaumont Division, on two counts of willfully and knowingly making and subscribing individual income tax returns (for the years 1958 and 1959), which were verified by written declarations that they were made under the penalties of perjury, and which petitioner did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C. 7206(1)). Each count of the indictment alleged that petitioner knowingly understated his gross income on his returns (R. 2-3). The bill of particulars stated, *inter alia*, that the government intended to rely on proof of specific items of unreported income, principally "omitted gross income from marble table [pinball machine] collections for the calendar years 1958 and 1959" (R. 36) and unreported interest income received by petitioner during the same years from one Fontenot (R. 37).

After a jury trial petitioner was found guilty on both counts (R. 52). He was fined $2,500 on each count and sentenced to 18 months imprisonment on Count I and to two years on Count II (R. 53-54). The latter prison sentence was suspended and petitioner was placed on probation for five years (R. 54).

The evidence supporting the jury's verdict can be summarized as follows:

During the years 1958 and 1959 petitioner was the sole owner of the Jefferson Novelty Co., which owned and operated juke boxes, pinball machines (often referred to in the record and the petition as "marble tables") and shuffle boards (R. 87, 96-97). Petitioner's employee Borel removed the coins from the machines at least once a week (R. 107, 115, 243). By reading the meters inside each machine Borel ascertained how much each "location owner" had paid out in cash for "free games" (R. 116-118, 224-225, 229-230). Borel then paid 40% of the net receipts to the location owner and kept 60% for petitioner (R. 117-119, 176, 245-246).

Acting under petitioner's instruction, Borel customarily prepared two sets of tickets at the time of each collection at many of the locations. One set, showing the true amounts collected, would be initialed by the location owner; the other, showing fictitious lesser amounts, would be signed by the location owner, who would retain a copy of the latter (false) ticket only (R. 119-139, 191, 245-246, 257, 309-330, 344-345, 359-360, 391). The amounts of money shown on the false tickets were simply made up by Borel "out of [his] head" (R. 119-121, 176), and a number of location owners testified to the fact that their 40% share of the weekly collections ranged from $8 to $50 higher than the amounts shown on these tickets (R. 275, 310, 344-345, 353-354, 361, 371, 377, 386). The collection tickets showing the true amounts

also showed the meter readings of the pinball machines; the false tickets did not show any meter readings (R. 127-139, 178-179, 445-447).

Petitioner's bookkeepers entered the lesser (false) amounts of income on petitioner's books (R. 227-228, 472-473), and these amounts were put on his income tax returns (R. 80, 85-86, 472, 481-482). Upon audit petitioner furnished the Treasury agents with the fictitious tickets (which agreed with petitioner's books) (R. 445-447, 466-468, 472-480, 485-490).

Although petitioner told the Treasury agents at the outset of their investigation that prior to 1960 he had not charged interest on cash loaned by him to individuals, the proof showed that during 1959 he received $640 in interest payments from Fontenot which was not reported on his tax return (R. 264-274, 463-464, 484-485).

ARGUMENT

1. There is no substance to petitioner's main contention (Pet. 9-10), that the trial judge committed plain error in instructing the jury as follows (R. 572-573):

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge would reasonably have expected to result from any act knowingly

> done or knowingly omitted by the defendant. In determining this issue of intent the jury is entitled to consider any statement or acts done or omitted by the defendant, and all facts and circumstances in the evidence which may aid in its determination of the state of his mind.

This instruction eliminated the only two faults in the instructions in three of the cases relied upon by petitioner, *Berkovitz* v. *U.S.*, 213 F. 2d 468 (C.A. 5); *Wardlaw* v. *United States*, 203 F. 2d 884 (C.A. 5th); *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9th).[1] First, it deleted any reference to a *presumption* of a guilty intent; it stated only what inferences the jury "may draw" and even limited these by adding "unless the contrary appears from the evidence." Second, the instruction did not state that wilfulness could even be inferred from the mere omission of items of gross income. The first and third sentences of the instruction simply repeated what has been, for many years, the standard instruction on circumstantial evidence of intent—that a man generally intends the normal consequences of his acts, an instruction which is as necessary and proper in a prosecution for tax evasion as in any other case. The normal consequence intended in omitting large amounts of income from a tax return is that the income will not be taxed and if, considering all the evidence in the case, the jury is satisfied that the taxpayer knew when he

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[1] The *Bloch* case was, moreover, later overruled *sub silentio* by *Brown* v. *United States*, 222 F. 2d 293, 298 (C.A. 9th). See *Herzog* v. *United States*, 226 F. 2d 561, 567 (C.A. 9th), opinion adhered to, 235 F. 2d 664, 668, certiorari denied, 352 U.S. 844.

filed the return that the items were taxable and that they were not being reported, it may infer the existence of the element of wilfulness. The second sentence of the instruction, though possibly awkward, certainly does not amount to reversible error in the absence of any objection at the trial. *Sherwin* v. *United States*, 320 F. 2d 137 (C.A. 9th), certiorari denied, 375 U.S. 964; *United States* v. *Denton*, 336 F. 2d 785, 788 (C.A. 6th).

It is true that in *Mann* v. *United States*, 319 F. 2d 404, certiorari denied, 375 U.S. 986, the Fifth Circuit reversed a conviction for income tax evasion on the ground that the instruction in question constituted plain error, but in that case "The sole defense" was lack of "wilfulness" (319 F. 2d at 410), and proof of that element of the offense, as well as its submission to the jury under proper judicial guidance, was the "vital aspect of the case" (*id.*). In the case at bar, as the court below recognized (Pet. 20-21) the real issue before the jury was not wilfulness but whether petitioner had in fact received the unreported income testified to by the government's witnesses, and which he has always claimed he did not receive (R. 463, 545-558). A conflict between holdings of different Fifth Circuit panels, even if it existed, would hardly be a basis for the granting of certiorari, and it must be assumed from the denial of the petition for rehearing *en banc* (R. 626) that the Fifth Circuit was satisfied that there is no such conflict.[2]

[2] We see no similarity between the case at bar and the cases in this Court (Pet. 9-10) with which it is said to be in

2. Also without merit is the argument (Pet. 10-11) that the district judge erred in failing to tell the jury that it must not consider evidence of unreported income items not listed in the bill of particulars. There was no such evidence; hence an instruction on the subject could have resulted only in confusing the jury.[3]

3. Nor is there substance to the argument (Pet. 11-12) that the court below erred in holding that the trial judge did not abuse his discretion in overruling an objection to the prosecutor's argument (Pet. 8) which was made in "fair response to the argument of defendant's counsel" (Pet. 22). The cases relied upon by petitioner bear no factual resemblance to the instant case.

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conflict. For example, in the first case mentioned, *Morissette* v. *United States*, 342 U.S. 246, this Court reversed a conviction on the ground that wilfulness was a question of fact which should have been submitted to the jury, rather than determined by the trial judge as a matter of law. There is nothing of that nature in the instant case.

[3] *People* v. *Davis*, 269 Ill. 256, 110 N.E. 9, relied upon by petitioner (Pet. 11), involved an instruction under which the jury might have considered evidence other than that spelled out in the bill of particulars. In the case at bar all of the items of unreported income proved at the trial (including the interest paid to petitioner by Fontenot) *were* included in the bill of particulars (R. 37).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1965.

END